In the
Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-5706

CHARLES WILLIAM PROFITT,
Petitioner

vs.

STATE OF FLORIDA,
Respondent.

On Writ of Certiorari
to the Supreme Court of Florida

BRIEF OF THE
COLORADO STATE PUBLIC DEFENDER
AS AMICUS CURIAE

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The Colorado Public Defender System files this brief Amicus Curiae pursuant to the written consent of the parties, and such consents have been filed with the Clerk of the Supreme Court.

INTEREST OF AMICUS CURIAE

The Colorado State Public Defender System is a statutorily created agency of the State of Colorado. The Defender System has the duty of representing indigent persons accused of felonies, misdemeanors, juvenile delinquency, mental health proceedings, appellate and post-conviction proceedings. The Colorado Public Defender System

consists of 78 lawyers, 14 investigators and the necessary secretarial personnel to fulfill their task of representing indigent persons accused of criminal misconduct.

In its effort to create a constitutional post-*Furman* death penalty statutory scheme the Colorado Legislature enacted Colorado Revised Statutes 16-11-103, 18-3-102, and 18-3-103. (See Appendix B). These statutes became effective January 1, 1975 and were patterned after and are very similar to the Florida death penalty statutes. (See Appendix A).

Since January of 1975, the Colorado Public Defender System has represented 25 persons accused of first degree murder who faced the possibility of the death penalty. The system is currently representing 20 persons charged with first degree murder who now face the possibility of the death penalty. The appellate division of the Colorado State Public Defender System is now representing one convicted person on death row who has been sentenced to death. The Colorado State Public Defender System is committed to the philosophy that the death penalty is a cruel and unusual penalty and is violative of the provision of the Eighth Amendment and that the statutory schemes enacted by the States of Florida and Colorado do not preclude unfettered discretion that was held unconstitutional in *Furman v. Georgia,* 408 U.S. 238-1972).

Because of the similarity of the Florida and Colorado statutes the fate of our clients will be affected by the Court's decision in the within case.

OPINION BELOW

The Opinion of the Supreme Court of Florida is reported at 315 So.2d 461 (Fla. 1975).

JURISDICTION

Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. Section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States. The relevant Florida statutes are:

Fla. Stat. Ann. Sections 755.082, 782.04, 921.141 (all appearing in 1974-1975 Supp.). (See Appendix A)

The relevant Colorado Statutes are Colorado Revised Statutes 16-11-103, 18-3-102, and 18-3-103. (See Appendix B)

QUESTION PRESENTED

Does the Florida statutory death penalty scheme preclude the arbitrary, discretionary and discriminatory determination of what convicted murderer lives or dies?

STATEMENT OF THE CASE

The Colorado State Public Defender System adopts the Petitioner's statement of the case.

ARGUMENT

I. THE FLORIDA STATUTORY DEATH PENALTY SCHEME DOES NOT PRECLUDE THE ARBITRARY, DISCRIMINATORY, DISCRETIONARY DETERMINATION OF WHICH CONVICTED MURDERER SHALL LIVE OR DIE.

Fla. Stat. Section 921.141 provides that "upon conviction or adjudication of guilt of a defendant of a capital felony the court *shall* conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment* * *". That statute goes on to provide that after hearing all the evidence the jury *shall* deliberate and render an advisory sentence to the court. (emphases added)

Likewise, Colorado Revised Statute 16-11-103 provides that "upon conviction of guilt of a defendant of a class 1 felony, the trial court *shall* conduct a separate sentencing hearing to determine whether the defendant should be sentenced to death or life imprisonment." The Colorado statute goes on to provide that "after hearing all the evidence the jury shall deliberate and render a verdict* * * as to the existence or nonexistence of the aggravating or mitigating factors and if a mitigating factor exists the Court *shall* sentence the defendant to life imprisonment. If no mitigating factors exist and any one of the aggravating factors are found to exist the Court *shall* sentence the defendant to death." (emphasis added)

A brief review of a number of first degree murder cases that have been resolved by the Colorado criminal justice system clearly reveals that who gets life and who gets death is still "freakishly" arbitrarily and discriminatorily determined and the unfettered discretion of the prosecutor notwithstanding the statutory "*shalls*" is the major factor in that determination.

In the El Paso County District Court, Colorado Springs, Colorado, in the case of *People v. Mitchell Martin* and *Michael Corbett,* No. 22668, the two named defendants were charged with first degree murder after deliberation. Discovery in the case revealed that the victim, one Ricky Lewis, was killed during a dice game when two assailants armed with shotguns came upon the game and started firing at the participants. Lewis was killed and five bystanders were wounded. The evidence revealed that there were expended twelve gauge and twenty gauge shotgun shells in the area. Through the plea bargaining process and an agreement of immunity in exchange for Martin's testimony against Corbett, the co-defendant Martin was permitted to plead guilty to accessory after the fact of first degree murder. Martin was then sentenced to the Colorado State Reformatory for an indeterminate period of time to a maximum of ten years.

Discovery evidence clearly indicated that Martin owned and possessed on that evening a twenty gauge shotgun and

Corbett owned and possessed a twelve gauge shotgun. Approximately six weeks before trial, the defense requested production of the shotguns and expended shells for testing. The prosecutor then conducted the necessary ballistics tests and found that the victim had died from pellets from the twenty gauge shotgun shell and none of the twelve gauge pellets penetrated any of the victims.

Mitchell is serving an indeterminate to ten years in the Colorado State Reformatory and Michael Corbett still faces charges of first degree murder and the possible death penalty. This case is included in our brief to illustrate the inherent injustice in letting the prosecutor's discretion be a major factor in determining who get the death penalty and also to illustrate the point that the prosecutor's discretion is not always that discreet.

In El Paso County, Colorado, in the case of the *People v. Howard Buckner,* Case No. 27750, Buckner was charged with first degree murder. Discovery indicated that the deceased and Buckner had words about the attentions of a certain young lady. Discovery evidence also indicated that the deceased was armed and had fired his weapon and it was a question of who started firing first. There was also evidence that the victim was shot in the back.

Notwithstanding the Colorado statutory provision, the District Attorney announced that he was not seeking the death penalty and a stipulation was entered into between counsel and approved by the court that the death penalty would not be an alternative for the jury in that case. The text of that stipulation is attached hereto as an Appendix C.

In El Paso County, Colorado, in Criminal Action No. 22784, Michael Corbett stands charged with murder after deliberation and felony murder in connection with the death of Daniel Howard VanLone. In a companion case, Freddie Glenn stands charged with the same homicide.

Information obtained through discovery indicates that Michael Corbett, Freddie Glenn, and Larry Dunn went to the Four Seasons Motel area with the intention of committing a robbery. The deceased, a cook, came out of the rear of the restaurant area after his shift had been completed about ten thirty in the evening, and that the three defendants at gun point put the deceased in their car, drove him down a road about one mile from the establishment, robbed him of fifty cents, and then shot the victim in the head killing him.

The El Paso County District Attorney's office has granted Larry Dunn complete immunity for his involvement in this offense in exchange for his testimony against Glenn and Corbett.

Even though the evidence indicates that Dunn's involvement may be more serious than either of the other defendants, the District Attorney has passed judgment that Dunn will live and not be prosecuted for any criminal activity in connection with this incident and that same office is vigorously seeking the death penalty against Corbett and Glenn.

In the City and County of Denver District Court in Case No. Cr. 4418, being styled *People v. Dennis Floyd King,* King was charged with felony murder and rape in connection with the rape and murder of one Barbara Benzin, which occurred in the City and County of Denver on March 28, 1975.

The discovery information indicated that the victim had been raped and that after the rape she had been strangled to death. The Defendant was apprehended in California approximately six months later and found possessing the credit cards of the victim. The defendant after being properly advised made a full confession of his participation in the offense. The defendant was returned to Colorado for trial and pursuant to plea bargaining defendant was permitted to plead guilty to second degree murder and he received a sentence from seventeen to fifty years in the Colorado State Penitentiary.

In *People vs. Robert Lee Romero,* Denver District Court, No. Cr. 4401, the defendant was charged with murder in the

first degree, conspiracy to commit murder and criminal attempt involving the death of Ruth V. Jordan. The offense was alleged to have occurred on the 31st day of July, 1975. In a companion case styled the *People vs. Gilbert Florentino Valerio,* No. Cr. 4398, Valerio was charged with the same offenses involving the same homicide.

Information obtained at the preliminary hearing revealed that Valerio and Romero went to the parking lot of the motel and restaurant. Two ladies were leaving the restaurant area headed toward their automobiles and Valerio accosted Ruth V. Jordan and Romero accosted the other lady, apparently with the thought of taking their purses away from them. In the course of the altercation, Romero was thwarted in his efforts and ran away and Valerio who was armed with a pistol, shot and killed Mrs. Jordan.

The evidence was that Romero had not even assaulted or accosted the victim of the homicide. Notwithstanding Colorado statutory procedure, prior to the commencement of the trial the district attorney and the defense attorney stipulated in writing the prosecutor would not seek the death penalty and the stipulation was approved by the court. (See Appendix D) At the conclusion of Romero's trial, he was found guilty of first degree murder, attempted robbery and conspiracy to commit robbery and pursuant to the stipulation no penalty hearing was held. Romero was sentenced to life imprisonment in the Colorado State Penitentiary.

Pursuant to plea bargaining defendant Valerio, who actually killed Mrs. Jordan, entered a plea of guilty to second degree murder and was sentenced to the Penitentiary for a term of not less than thirty-five nor more than fifty years.

In *People vs. Richard Thiery,* Denver District Court, No. Cr. 4782. Thiery was charged with felony murder and aggravated robbery.

Evidence at the preliminary hearing revealed that Thiery had entered a tavern wearing a ski mask carrying a loaded gun. He held up approxima twenty people in the

tavern, taking their money and the cash box from the proprietor. There was evidence that after the robbery, while Thiery was backing out of the tavern, he coldly shot a patron in the head and the patron died. There was other evidence that a patron grabbed at Thiery as he was backing out of the tavern and hit Thiery's arm and the gun was discharged killing the patron.

As a result of plea bargaining Thiery was permitted to plead guilty to second degree murder. The court sentenced him to a term not less than twenty years nor more than fifty years and the charges of first degree and aggravated robbery were dismissed.

In *People vs. Ernest A. Vialpando,* Denver District Court No. 91326, defendant was charged with two counts of first degree murder involving two separate victims. He was charged with killing the victims after deliberation.

The evidence at the preliminary hearing indicated that Mr. Vialpando had previously exchanged words with the victim Juarez and had accused Juarez of stealing his television set. On the fatal morning, Juarez and one Lovato were in an after hours drinking establishment and were told that Vialpando wanted to see them. They drove to his house with two of Juarez's sisters. Upon arriving they were invited into the house and upon their entering the house, Lovato went to the bathroom, Vialpando followed him into the bathroom and shot him in the back. The defendant then came out into the living room and shot Juarez three times in the chest. Vialpando was examined by three psychiatrists; two found him to be sane and one found him temporarily insane due to the ingestion of alcohol and the smoking of marijuana. Through the plea bargaining process Mr. Vialpando was permitted to plead guilty to second degree murder in connection with the Lovato killing and manslaughter in connection with the Juarez killing. The district attorney had determined that Vialpando should not get the death penalty. Vialpando was sentenced to concurrent sentences of indeterminate to ten and twelve and one-half years to forty years in the Colorado State Penitentiary.

In *People vs. Holland,* Case No. C. 5994 in the Adams County District Court, Holland was charged with first degree murder in connection with the death of Delores Hall.

Evidence at the preliminary hearing indicated that Holland and David Harding were friends. Holland on the night in question had a date with Delores Hall. After they left a tavern, Holland endeavored to rob Delores Hall. Holland shot her twice with a twenty-two caliber pistol, killed her and dumped her out of her car. The evidence indicated that Holland then returned to the motel where he and Harding were staying. He told Harding what had taken place and they went to Delores Hall's home in her automobile. Then with her keys gained entrance into her home where they burglarized her home and stole a number of items of personal property. They then took Delores Hall's automobile and fled to Albuquerque, New Mexico where Holland perpetrated two robberies.

Harding contacted the Albuquerque police authorities. told them about the two local robberies, and of the fact Holland was wanted for a murder in Colorado. Holland was apprehended and returned to Colorado for prosecution.

Through plea bargaining, Holland was permitted to plead guilty to first degree life and in consideration of that plea the two New Mexico robberies were dropped, a City and County of Denver felony assault case was dropped and the Federal Government agreed not to prosecute Holland on 36 counts of forgery.

In the same jurisdiction, Adams County Colorado, in Case No. C-5713 entitled the *People vs. Dean Wildermuth,* Wildermuth was charged with first degree murder. Evidence at the trial revealed that Wildermuth had met the victim in a tavern. They had drinks together and the victim agreed to give Wildermuth a ride home. The victim and Wildermuth went to the victim's apartment where Wildermuth attempted to rob her. Wildermuth sexually assaulted the victim and stabbed her to death. After the fatal wound was inflicted, Wildermuth superficially scratched a swastika in the victim's nude chest. Like Holland, Wildermuth took the victim's automobile and

some personal effects from the victim's house and fled in the victim's car to another state. He was apprehended with her car and returned to the State of Colorado for prosecution on the felony murder charges.

Wildermuth had no other charges pending against him however he could have been charged with assaulting a Kansas filling station operator in connection with his apprehension there. Plea bargaining was unsuccessful in Wildermuth's case and he went to trial on the first degree murder charge and was convicted of first degree murder. The jury found there were no mitigating circumstances and found that the homicide was committed in a particularly heinous manner. Wildermuth has been sentenced to death and is now the only resident of Colorado's Death Row.

In *Furman vs. Georgia*, supra, the majority of the Court agreed that the death penalty is a cruel and unusual punishment because it is imposed infrequently and under no clear standards. The majority of the Court also agree that the purpose of the death penalty, whether it be retribution or deterrence, cannot be achieved when it is so rarely and unpredictably used. The purpose of the Eighth and Fourteenth Amendments is to bar legislatures from imposing punishments like the death penalty which, because of the way they are administered serve no valid social purpose.

We respectfully submit that the foregoing Colorado cases clearly indicate that there is no uniform standard in Colorado as to who should or who will get the death penalty.

In analyzing the cases of Dennis Floyd King, David Holland and Dean Wildermuth, it is apparent that there is a great deal of similarity in the offenses. Each defendant robbed and killed a woman and King and Wildermuth also sexually assaulted their victims. There is no rhyme or reason as to why Dennis Floyd King is serving a sentence of not less than seventeen years nor more than fifty years, why Holland was permitted to plead to first degree life and have three other serious felony charges dismissed or why Dean Wildermuth was sentenced to death.

In studying the VanLone killing wherein Corbett and Glenn are charged with first degree murder and face the possibility of the death penalty, it is most difficult to understand why Dunn, who is equally culpable (possibly more culpable than the other two defendants) will go scot free from any criminal charges, in exchange for his testimony against the other two defendants.

Under the present statutory scheme and the way it is being implemented by prosecutors, the death penalty will still be rarely and unpredictably used in Colorado and the prosecutors' unbridled discretion will determine when and upon whom it will be utilized.

We further submit that because of the way Colorado's death penalty scheme is presently administered it serves no valid social purpose, has no proper place in the criminal justice system and does not preclude the death penalty from being arbitrarily and discriminatorily applied in the discretion of the prosecutor.

CONCLUSION

For the above reasons the Amicus Curiae, Colorado State Public Defender System urges this Honorable Court to hold that the death penalty is a cruel and unusual punishment prohibited by the Eighth Amendment and that the Florida statutory death penalty scheme is unconstitutional in that it permits the death penalty to be arbitrarily and discriminatorily applied at the whim of the prosecutor.

Respectfully submitted,

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APPENDIX A

APPLICABLE FLORIDA STATUTES

Fla. Stat. Ann. §755.082 (1974-1975 Supp.) Penalties for felonies and misdemeanors.

(1) A person who has been convicted of a capital felony shall be punished by life imprisonment and shall be required to serve no less than twenty-five (25) calendar years before becoming eligible for parole unless the proceedings held to determine sentence according to the procedure set forth in section 921.141 results in findings by the court that such person shall be punished by death, and in the latter event such person shall be punished by death.

(2) In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, a person convicted of a capital felony shall be punished by life imprisonment as provided in subsection (1).

(3) In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment as provided in subsection (1).[1]

Fla. Stat. Ann. §782.04 (1974-1975 Supp.) Murder.

(1) (a) The unlawful killing of a human being when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed by a person

[1]This section was amended in 1974 in a manner that is not pertinent here.

engaged in the perpetration of, or in the attempt to perpetrate, any arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb, or which resulted from the unlawful distribution of heroin by a person over the age of seventeen (years) when such drug is proven to be the proximate cause of the death of the user, shall be murder in the first degree and shall constitute a capital felony, punishable as provided in §755.082.

(b) In all cases under this section the procedure set forth in section 921.141 shall be followed in order to determine sentence of death or life imprisonment.

(2) When perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, or when committed in the perpetration of or in the attempt to perpetrate any arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb, except as provided in subsection (1), it shall be murder in the second degree, and shall constitute a felony of the first degree, punishable by imprisonment in the state prison for life or for such term of years as may be determined by the court.

(3) When perpetrated without any design to effect death, by a person engaged in the perpetration of, or in the attempt to perpetrate any felony other than arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb, it shall be murder in the third degree and shall constitute a felony of the second degree, punishable as provided in section 775.084.

Fla. Stat. §921.141 (1974-1975 Supp.) Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.

(1) **Separate proceeding on issue of penalty.** Upon conviction or adjudication of guilt of a defendant of a capital felony the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by section 755.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If the trial jury has been waived or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsection (6) and (7), of this section. Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) **Advisory sentence by the jury.** After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:
   (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (6);
   (b) Whether sufficient mitigating circumstances exist as enumerated in subsection (7), which

outweigh the aggravating circumstances found to exist, and
   (c) Based on these considerations, whether the defendant should be sentenced to life .... or death.

(3) **Findings in support of sentence of death.** Notwithstanding the recommendation of a majority of the jury, the court after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:
   (a) That sufficient aggravating circumstances exist as enumerated in subsection (6), and
   (b) That there are insufficient mitigating circumstances, as enumerated in subsection (7), to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsection (6) and (7) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with section 775.082.

(4) **Review of judgment and sentence.** The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within sixty (60) days after certification by the sentencing court of the entire record unless the time is extended for an additional period not to exceed thirty (30) days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) **Aggravating circumstances.** Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.
(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.
(c) The defendant knowingly created a great risk of death to many persons.
(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.
(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
(f) The capital felony was committed for pecuniary gain.
(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function of the enforcement of laws.
(h) The capital felony was especially heinous, atrocious or cruel.

(6) **Mitigating circumstances.** Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.
(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.
(c) The victim was a participant in the defendant's conduct or consented to the act.
(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.
(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
(g) The age of the defendant, at the time of the crime.

APPENDIX B

APPLICABLE COLORADO STATUTES

Colorado Revised Statutes – 16-11-103. Imposition of sentence in class 1 felonies.

(1) Upon conviction of guilt of a defendant of a class 1 felony, the trial court shall conduct a separate sentencing hearing to determine whether the defendant shall be sentenced to death or life imprisonment. The hearing shall be conducted by the trial judge before the trial jury as soon as practicable. If a trial jury was waived or if the defendant pleaded guilty, the hearing shall be conducted before the trial judge.

(2) In the sentencing hearing any information relevant to any of the aggravating or mitigating factors set forth in subsection (5) and (6) of this section may be presented by either the people or the defendant, subject to the rules governing admission of evidence at criminal trials. The people and the defendant shall be permitted to rebut any evidence received at the hearing and shall be given fair opportunity to present argument as to the adequacy of the evidence to establish the existence of any of the factors set forth in subsection (5) or (6) of this section.

(3) After hearing all the evidence, the jury shall deliberate and render a verdict, or if there is no jury the judge shall make a finding, as to the existence or nonexistence of each of the factors set forth in subsections (5) and (6) of this section.

(4) If the sentencing hearing results in a verdict or finding that none of the factors set forth in subsection (5) of this section exist and that one or more of the factors set forth in subsection (6) of this section do exist, the court shall sentence the defendant to death. If the sentencing hearing results in a verdict or finding that none of the aggravating factors set forth in subsection (6) of this section or that one or more of the mitigating factors set forth in subsection (5)

of this section do exist, the court shall sentence the defendant to life imprisonment. If the sentencing hearing is before a jury and the verdict is not unanimous, the jury shall be discharged, and the court shall sentence the defendant to life imprisonment.

(5) The court shall not impose the sentence of death on the defendant if the sentencing hearing results in a verdict or finding that at the time of the offense:

(a) He was under the age of eighteen; or
(b) His capacity to appreciate wrongfulness of his conduct or to conform his conduct to the requirement of law was significantly impaired, but not so impaired as to constitute a defense to prosecution; or
(c) He was under unusual and substantial duress, although not such duress as to constitute a defense to prosecution; or
(d) He was a principal in the offense, which was committed by another, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution; or
(e) He could not reasonably have foreseen that his conduct in the course of the commission of the offense for which he was convicted would cause, or would create a grave risk of causing, death to another person.

(6) If no factor set forth in subsection (5) of this section is present, the court shall sentence the defendant to death if the sentencing hearing results in a verdict or finding that:

(a) The defendant has previously been convicted by a court of this or any other state, or of the United States, of an offense for which a sentence of life imprisonment or death was imposed under the laws of this state or could have been imposed under the laws of this state if such offense had occurred within this state; or

(b) He killed his intended victim or another, at any place within or without the confines of a penal or correctional institution, and such killing occurred subsequent to his conviction of a class 1, 2, or 3 felony and while serving a sentence imposed upon him pursuant thereto; or

(c) He intentionally killed a person he knew to be a peace officer, fireman, or correctional official. The term "peace officer" as used in this section means only a regularly appointed police officer of a city, marshal of a town, sheriff, undersheriff, or deputy sheriff of a county, state patrol officer, or agent of the Colorado bureau of investigation; or

(d) He intentionally killed a person kidnapped or being held as a hostage by him or by anyone associated with him; or

(e) He has been a party to an agreement in furtherance of which a person has been intentionally killed; or

(f) He committed the offense while lying in wait, from ambush, or by use of an explosive or incendiary device. As used in this paragraph (f), explosive or incendiary device means;

(I) Dynamite and all other forms of high explosives;

(II) Any explosive bomb or grenade, missile, or similar device; or

(III) Any incendiary bomb or grenade, fire bomb, or similar device, including any device which consists of or includes a breakable container including a flammable liquid or compound, and a wick composed of any material which, when ignited, is capable of igniting such flammable liquid or compound, and can be carried or thrown by one individual acting alone; or

(g) He committed a class 1, 2, or 3 felony and, in the course of or in furtherance of such or

immediate flight therefrom, he intentionally caused the death of a person other than one of the participants; or

(h) In the commission of the offense, he knowingly created a grave risk of death to another person in addition to the victim of the offense; or

(i) He committed the offense in an especially heinous, cruel, or depraved manner.

Colorado Revised Statutes, 1973 – 18-3-102. Murder in the first degree.

(1)(a) After deliberation and with the intent to cause the death of a person other than himself, he causes the death of that person or of another person; or

(b) Acting either alone or with one or more persons, he commits or attempts to commit arson, robbery, burglary, kidnapping, sexual assault in the first or second degree as prohibited by section 18-3-402 or 18-3-403, or a class 3 felony for sexual assault on a child as provided in section 18-3-405(2), and, in the course of or in furtherance of the crime that he is committing or attempting to commit, or of immediate flight therefrom, the death of a person, other than one of the participants, is caused by anyone; or

Colorado Revised Statutes, 1973 – 18-3-103. Murder in the second degree.

(1)(a) He causes the death of a person intentionally, but not after deliberation; or

APPENDIX C

IN THE DISTRICT COURT WITHIN AND FOR THE COUNTY OF EL PASO AND STATE OF COLORADO
Criminal Action No. 27750
Div. 5

THE PEOPLE OF THE STATE OF COLORADO	]	
vs.	]	**REPORTER'S PARTIAL TRANSCRIPT**
HOWARD DEAN BUCKNER,	]	
Defendant.	]	

The above and foregoing cause came on for trial to a jury, with the Hon. John F. Gallagher, District Judge, presiding, on the 3rd day of February, 1976, in the El Paso County Judicial Building, Colorado Springs, El Paso County, Colorado.

APPEARANCES:

FOR THE PEOPLE: David Zook, Deputy District Attorney, and John T. Riggs, Deputy District Attorney.

FOR THE DEFENDANT: Barney Iuppa, Deputy State Public Defender, Chad Milton, Deputy State Public Defender.

WHEREUPON, the following stipulation was entered on the record by counsel for the respective parties;

MR. IUPPA: Your Honor, I think the last matter concerns the matter of the death penalty. Mr. Buckner as he presently is charged, does not come under the new Colorado statute that does allow for the death penalty. Mr. Zook and myself have discussed the matter. We have agreed to enter into a stipulation, the nature of the stipulation being that under the provisions of the amended statutes, 1973 as amended, 16-11-103, under Subsection 6, it lists out several aggravating factors which in essence provide that if any of these aggravating factors do exist, that it shall be mandatory for the Court to impose the death penalty, unless some of the mitigating circumstances enunciated in 16-11-103 (5) are present.

It is my understanding that the District Attorney is willing to stipulate that none of the aggravating factors enumerated under 16-11-103, Paragraph Six, (a) through (i), that none of those aggravating factors are in existence in this case, and that the death penalty is not being asked for, not being sought, nor is it to be a penalty in this case.

MR. ZOOK: That is correct, Your Honor. We don't feel we could meet any burden, the burden of proof which would be upon us to demonstrate the presence of any of the aggravating factors, and we have no evidence to support any of them, and therefore have not alleged and have not requested the death penalty, and will not do so.

I might also add, Your Honor, that the evidence perhaps might also demonstrate the presence of some of the mitigating circumstances. I can't agree to that, but perhaps it may.

So for those reasons, we are not asking for it, and don't feel we would be entitled to it.

THE COURT: There are a couple of – The Court will approve that stipulation. There are a couple of questions I'd like to ask, though:

First, it's my understanding that the statute calls for, in the event there [sic] there is a finding of guilty of First

Degree Murder, the statute provides for a second hearing in front of the jury. Inasmuch as this stipulation is going to be entered into, will there be any necessity for such a second hearing?

MR. IUPPA: I believe we will have the second hearing, but I think what the essence will be, would be for the Court informing the jury of the stipulation, and ordering a directed verdict, in essense, that the only verdict that they can return is one that none of these aggravating circumstances exist.

MR. ZOOK: I think that's – I think so, Your Honor.

MR. RIGGS: I think since the provision is that there be a second hearing, I think you have to have it, but we would just advise them that they can't consider the death penalty, because of the stipulation, and Life would be the only penalty.

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STATE OF COLORADO)
) CERTIFICATE OF REPORTER
COUNTY OF EL PASO)

I, CHARLES W. PISHNY, C.S.R., Official Court Reporter within and for the Fourth Judicial District of the State of Colorado, do HEREBY CERTIFY that the foregoing pages numbered from 1 through 2, constitute a full, true, correct and complete transcript of the stipulation entered into between counsel for the respective parties during trial of the case of The People of the State of Colorado versus Howard Dean Buckner, Criminal Action No. 22750 in Division Five of the District Court within and for the County of El Paso and State of Colorado.

IN WITNESS WHEREOF, I have hereunto set my hand in the City of Colorado Springs, County of El Paso and State of Colorado, this 13th day of February, 1976.

/s/ Charles W. Pishny
Charles W. Pishny, C.S.R.
Official Court Reporter

APPENDIX D

IN THE DISTRICT COURT IN AND FOR THE

CITY AND COUNTY OF DENVER

STATE OF COLORADO

Criminal Action No. CR 4401, Ct. Rm. 10

THE PEOPLE OF THE STATE OF COLORADO	]	
Plaintiff,	]	STIPULATION RE:
vs.	]	DEATH PENALTY
ROBERT LEE ROMERO	]	
Defendant	]	

The District Attorney, on behalf of the People of the State of Colorado, will not seek the death penalty in this case and will not seek to death-qualify the jury.

/s/ Peter R. Bornstein
District Attorney

/s/ Alvin D. Lichtenstein
Attorney for Defendant

This stipulation is approved by the Court and the Court agrees not to consider the death penalty in this case.

DONE AND SIGNED THIS 26TH day of November, 1975

/s/ Robert P. Fullerton
Judge Robert P. Fullerton


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